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No. 75-1786

In the
Supreme Court of the United States

OCTOBER TERM, 1975

FEED SERVICE CORPORATION,

Petitioner,

vs.

KENT FEEDS, INC., and
GRAIN PROCESSING CORPORATION,

Respondents.

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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REASONS FOR DENYING THE WRIT

**1. The Petition For a Writ of Certiorari
Presents No New Issue of Law or Any
Issue of Public Importance**

The petition for a writ of certiorari does nothing more than ask for a review of the scope and validity of the patent in suit in the hope that this Court will reach a conclusion different from that of the Court of Appeals. The issues sought to be reviewed involve the description of the invention in the patent specification, the prosecution history of the patent application and the scope of the claims and of the prior art.

The patent in suit expired in 1974, before trial in the District Court, and had never been otherwise litigated. Petitioner's trial counsel admittedly wrote the District Court's findings of fact and conclusions of law *in toto*, but the District Court did not add any memorandum opinion. However, after reviewing the evidence at length, the Court of Appeals concluded that the patent was not entitled to the all-encompassing construction urged by the patent owner. The Court of Appeals stated:

"In our considered judgment the plaintiff is limited to a narrow construction of the patent in suit." (App. 20.)*

While petitioner is asking this Court to give a broad construction to the suit patent so as to find infringement, petitioner is silent as to the validity of the patent if the claims were to be broadly construed to encompass the accused animal feed compositions. If patent claims are construed broadly for determining infringement, they must be construed likewise for determining the question of validity, *i.e.*, the claims must exclude that which is already in the public domain. In concluding that the suit patent was valid, the Court of Appeals properly considered the prior art and construed the patent narrowly in order to avoid the prior art. The Court held:

"It has not been shown that there is anything in the prior art disclosing the composition of alcohol and urea as taught in the patent in suit. This appears to be the classic case of a combination of two elements old in the art which produced a new and useful result. In this respect it is a narrowly construed patent and must necessarily be so." (App. 15.)

* "App." is used hereinafter to designate materials in Petitioner's Appendix to its petition.

Even if this Court were to reject the considered judgment of the Court of Appeals and to conclude that the patent in suit were entitled to a broad construction, no matter affecting the public interest would be involved. The scope of the patent, as shown by the evidence, applies only to the feed supplements manufactured by the parties to this litigation during the last four years of the patent's lifetime.

2. Petitioner's Reasons For Allowance Of Writ Lack Merit

A. A Patent On The Chemical Composition Of Animal Feed Must Be Interpreted Like Any Other Patent

The petitioner's ecological emphasis does not mandate special consideration. The patent is simply directed to certain varieties of cattle feed compositions containing basically a combination of a synthetic nitrogen source (urea) and ethanol (ethyl alcohol).

Cutting through the verbiage of the petition, any patent, including its history in the Patent Office and the scope and content of the prior art, must be studied to determine the invention, if any. If the accused product, composition or device is not the invention disclosed and claimed in the patent, there is no infringement. The Court of Appeals has made this study and concluded with respect to the patent in suit:

"Defendants do not *add* alcohol to their feed supplement and plaintiff does not charge them with that. The charge of infringement is based on the use by defendants of fermented molasses which provides the alcohol in question as the natural occurring event. We have concluded that the patent in suit is limited to the teaching of the *addition* of alcohol in feed supplements." (App. 20.)

**B. The Court Of Appeals' Decision
Does Not Conflict With Cases
Decided By The Supreme Court**

Petitioner now urges that the Court of Appeals' decision should be reexamined because, it is said, the respondents' accused product is the *equivalent* of the product claimed in the suit patent. In the Court of Appeals, petitioner *denied* that the doctrine of equivalents was applicable, saying, in its brief below:

"Here this Court is presented with outright duplication, characterized by the Supreme Court [in the *Graver Tank* case, cited *infra*] as 'a dull and very rare type of infringement.'"

and,

"The piracy is literal, the duplication outright and forthright."

Manifestly, petitioner has now decided to pursue a different tack, but although its present argument is hardly fair to the Court below, there can be no doubt that the Court of Appeals was fully cognizant of, and applied, all applicable rules of law in reaching its conclusion of noninfringement.

The Court of Appeals' decision does not conflict with the decisions of this Court cited in the petition. Petitioner misconceives the thrust of *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 339 U.S. 605 (1950). For determining infringement, petitioner construes the *Graver Tank* case as requiring the doctrine of equivalents to be applied in a vacuum, without considering what the actual invention of the patent is, or the prior art. The *Graver Tank* case does not set forth such a rule of law. On the contrary, this Court, in *Graver Tank*, said (Id. 609):

"What constitutes equivalency must be determined against the context of the patent, the prior art, and

the particular circumstances of the case. Equivalence, in the patent law, is not the prisoner of a formula and is not an absolute to be considered in a vacuum."

The appellate decision in the instant case is in full accord with the law expressed in *Graver Tank*, in which it was held (Id. 608):

"The wholesome realism of this doctrine is not always applied in favor of a patentee but is sometimes used against him. Thus, where a device is so far changed in principle from a patented article that it performs the same or a similar function in a substantially different way, but nevertheless falls within the literal words of the claim, the doctrine of equivalents may be used to restrict the claim and defeat the patentee's action for infringement. *Westinghouse v. Boyden Power Brake Co.*, 170 U.S. 537, 568."

Aptly, the Court of Appeals stated:

"The fact that the defendants' Bovino product may reach the same result as plaintiff's Morea is not conclusive of the determination of infringement." (App. 20.)

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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